IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 290

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Centerline Relief Drain District of Macomb County, Michigan,
Petitioners,
vs.
CENTERLINE RELIEF DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI

Answering the brief as above entitled, we urge the following:

1. ACTION BY THIS COURT SHOULD BE DEFERRED UNTIL IT IS KNOWN THAT THE OPINION AS FILED BY THE SUPREME COURT OF MICHIGAN, IN CITY OF HIGHLAND PARK v. CLARK, IS FINAL AND OFFICIAL.

A brief has been filed by us in the companion case, *Keefe, et al. v. Martin Drain and Branches Drain District,* No. 290, in which we set forth our argument under this heading. We refer the court and opposing counsel to the same, also to the appendix to the brief in which the argument is supported.

2. EVEN IF THE STATE COURT'S OPINION REMAINS IN SUBSTANTIALLY THE SAME FORM AS THE ONE ON FILE IT DEMONSTRATES THE TRUTH OF PETITIONERS' CONTENTION THAT THE LOWER COURT ERRED IN DETERMINING LOCAL LAW.

(a) An essential and necessary step in the lower court's reasoning was that in some judgment or decree of an inferior State Court it had been held that the improvement known as Centerline Relief Drain was not a drain, and that such judgments or decrees were *res judicata* against bondholders in this case although they were not parties to the suits in which the decrees or judgments were rendered. The opinion of the lower court does not indicate what such judgments or decrees were. The only reference in the record to prior decrees is paragraph 13 of the Bill of Complaint (R. 13) which alleges, as the basis for an injunction to restrain diversion of the drain fund, the entry of some judgments or decrees awarding a return of drain taxes and cancelling assessments. The basis of these decrees and judgments is alleged to be the erroneous claim that the drain commissioner's jurisdiction extended only to the construction of an open ditch, something which all now concede is erroneous. The lower court said (R. 511):

> "The officers of the drain district represented all the creditors of the district, including bondholders, in the state court cases, and thus appellants (appellees) had notice and were given their day in court in those cases."

Because of this the lower court said later "Those cases are *res judicata* of the determinative facts of this controversy." This statement as to a relationship between bondholders and the officers of the drain district is flatly contradicted by the Michigan Court. It says (see page 9 of Respondents' Brief):

> "We do not say that the Village of Oak Park case *(supra)* is *res judicata* of the rights of these relator bondholders, nor do we hold that they had their day in court, through representation of the drain commissioner who was the defendant in that action."

While it says that the Oak Park case which involved the same improvement is a precedent which it should follow, that reasoning could not be applied here. Decisions of inferior courts without reasoning to back them, and contrary to last resort court decisions, are never precedents. Since there was neither *res judicata* nor a precedent, it was the duty of the lower court to consider the evidence adduced and decide whether the Master and district court were correct in deciding that the evidence relating to the construction of this improvement rendered it an illegal enterprise. It is only because of a peculiar conception of an agency existing between bondholders and the district officers, now held unwarranted, that the lower court deemed it unnecessary to consider the sufficiency of the evidence under which the district court reached the conclusion of illegality. Had not this erroneous view been entertained, it would have been necessary to consider this evidence and pass upon the question of its legal sufficiency, under the local court's last decision on the subject of legality of

drainage projects, *Detroit Trust Co. v. Dingman,* 291 Mich. 170, and we believe that the lower court would have done so. It did this in *Royal Oak Drain District v. Keefe,* 87 Fed. (2) 786.

(b) The lower court rejected the authority of *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, saying that "the villages themselves took part in the false recital" (R. 511). The Michigan Supreme Court, however, accepts these cases as authorities which would rule the decision in all cases involving drain bonds, *bona fide* held, where the bonds themselves contained no notice of infirmity. It held that the Royal Oak No. 7 Storm Sewer Drain District bonds contained this notice of infirmity because of the title of the improvement. It must necessarily follow from this that had the words "storm sewer" been omitted from this title, the decision would be the other way. It emphasized by quotation from the Thompson case, the following: "A *bona fide* purchaser for value had a right to rely upon the statement of the board, appearing on the bond, that it was issued to borrow money under this act, for lawful purposes, i. e., public improvements." (See p. 11 Respondents' Brief.) In this case the title of the proceedings and bonds, and all references therein, indicated that the improvement contemplated would be a drain (R. 22, 481). These bonds carried on their face a false pretense, in that they certified that the money was to be spent to build a drain, and that all acts, conditions, etc., existed and had been performed to make them binding obligations.

(c) Recognition of the authority of *Thompson v. Mecosta (supra),* and other Michigan cases of like import, and the authorities cited therein, necessarily controverts the lower court's theory that the recitals in these bonds did not have such form as to make them inconsistent with the

claim that the improvement was not to be a drain. In the Thompson case, the recital was merely compliance with the governing law. Here the bonds not only recite compliance, but add the further statement of the due happening, existence and performance of all acts and events essential to their validity.

It cannot be doubted that had the lower court known the views of the Michigan Court of last resort, as expressed in this opinion, it would have eliminated from its opinion its determination that a decree in a prior suit was *res judicata,* that a drain district's bonds with recitals such as these do not carry a false pretense, and that such bonds would not estop the district to assert that the improvement built with their proceeds was not a drain. With those propositions eliminated, we believe it logical to infer that the lower court would have affirmed the district court's decree.

We submit that the opinion of the state court demonstrates vital errors by the lower court in its assumption that local law required it to reverse the district court in this case. Local law, in its application to drain bonds and the facts in this case, is now known, or will be as soon as this opinion of the Michigan court becomes final and official. Therefore, the petition for rehearing and petition for certiorari should be granted, and the case reversed and remanded to the lower court, with directions to decide the case in accordance with the now known principles of local law.

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